IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-748

C. D. (Denny) ABBOTT,

Petitioner,

VS.

WILLIAM F. THETFORD, Individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama (JOHN W. DAVIS, III, substituted for William F. Thetford in his official capacity as Judge of the Family Court of Montgomery County, Alabama),

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard H. Dorrough
P. O. Box 429
Montgomery, Alabama 36101

Counsel for Respondents

INDEX

TABLE OF AUTHORITIES

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Respondents respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit, En Banc, entered July 6, 1976, presents no question for review by this Court.

OPINIONS BELOW

The Petition for Certiorari appends the lower opinion in full and no further presentation thereof is necessary.

JURISDICTION

Respondents do not contend that the Court lacks jurisdiction to review the judgment of the Fifth Circuit should it decide to grant certiorari.

QUESTIONS PRESENTED

For the convenience of the Court, Respondents will adopt the wording and categorization of the petition regarding the questions presented for review. By so doing, Respondents in no way intend to impute veracity or merit to such questions.

STATEMENT OF THE CASE

Petitioner, C. D. (Denny) Abbott, was, until his discharge, Chief Probation Officer for the Family Court of Montgomery County, Alabama (R.317). Respondent, Judge Thetford, was, at the time of Abbott's discharge, the presiding Judge of said court (R.478) and was Abbott's immediate supervisor (R.480-481). As Chief Probation Officer, Abbott was the primary intermediate link in the chain of command between the judge and his Juvenile Court staff of approximately forty (40) employees. (R.480-481,579).

THE 1969 LAWSUIT

In January of 1969, Mr. Abbott filed suit in his capacity as Chief Probation Officer seeking to improve conditions at the Montgomery County Juvenile Detention Center and to correct alleged mistreatment of blacks at Mount Meigs Industrial School. Prior to filing this suit Mr. Abbott did not inform Judge Thetford of his intention to do so (R.483) nor had he ever informed Judge Thetford of the mistreatment alleged at Mount Meigs (R.483). Though Mr. Abbott contended the Judge was aware of such mistreatment from habeas corpus petitions, the court records reflected no such petitions ever having been filed (R.485-489). Judge Thetford was aware of undesirable conditions at the detention

center, however, at the time the suit was filed a new detention center was being constructed under Judge Thetford's guidance (R.482,347).

Upon receiving notice that Mr. Abbott had filed this lawsuit in his capacity as Chief Probation Officer and after reviewing the complaint therein, Judge Thetford wrote Mr. Abbott the following letter, dated January 23, 1969:

> Dear Mr. Abbott:
>
> I have completed a study of the complaint which you filed in Federal Court in the above styled cause.
>
> You are aware of the fact that I was not informed of the filing of this suit until after the same had been filed. You are also aware of the fact that I was informed of no incidence of child mistreatment at the State Training School at Mt. Meigs prior to the filing of this suit. As Chief Probation Officer of the Family Court of Montgomery County, you also are aware of your duty to inform me of incidences of child abuse. The Family Court of Montgomery County has full authority to correct and punish incidences of child abuse and is the proper forum for such action. In your complaint you allege that detention facilities in Montgomery County are inadequate; while this is true, you are also aware of the fact that Montgomery County has recognized this and is in the process of spending more than eight hundred thousand dollars to correct this situation and provide people of Montgomery County with a detention facility which will be excelled by none in the nation.
>
> As you know, over the years since I have been Judge of this Court,

> I have depended upon your integrity, trust and ability to a great extent in the operation of this court. As an officer of this court you have been granted great discretion because of the trust I had in you. Your actions as chief probation officer in withholding facts and in filing a suit in Federal Court without my knowledge is a distinct betrayal of that trust and of the court for whom you work. (Plaintiff's Tr. Ex. 4) (R.490-492).

No other action was taken at that time against Mr. Abbott for filing the suit. Approximately three months later Judge Thetford concerned that the publicity surrounding the suit was damaging the image of his court, requested Mr. Abbott to refrain from issuing press releases about it (R. 494,516). After a further press statement was made in direct disregard to Judge Thetford's request, Mr. Abbott was suspended for ten days (R.492-493).

THE 1972 LAWSUIT

In September of 1972, Judge Thetford received information that Mr. Abbott might be planning another lawsuit (R.494). On September 29, 1972, (R.565), he called together his chief staff officers, including Abbott, and advised them that no litigation which would affect the operation of the court should be filed without his prior knowledge and approval (R.495) (354 F.Supp. at 1283). Mr. Abbott did not question or discuss this directive with the Judge, but on leaving the meeting turned to a colleague and stated, "Somebody has been talking to the judge." (R.495-96,570).

On November 17, 1972, Abbott filed suit as "best friend" of three minors against six private

children's homes seeking to integrate them and to terminate their tax exempt status and against the State Department of Pensions and Securities (D.P.S.) to require it to cease licensing segregated homes and create more resourses for black children. Again, Abbott filed suit alleging his position as Chief Probation Officer and, again, he did so without first conferring with Judge Thetford concerning either the problems or the remedy. Mr. Abbott testified he never even considered consulting the judge about it (R.382). As evidence of Mr. Abbott's attitude it was shown that immediately after filing the suit he told a fellow employee that he liked "to keep things stirred up." (R.602). As the trial court found, the evidence was that Mr. Abbott willfully and knowingly violated the September directive (354 F.Supp. at 1283). Prior to his action in November, Mr. Abbott made no attempt to seek clarification of the directive nor did he seek any of the administrative remedies available to him pursuant to state law as provided by the merit system.

Upon again learning of Mr. Abbott's activities, again from the newspaper, Judge Thetford called him in and Abbott elected to be discharged rather than resign (R.500). Judge Thetford dictated a termination letter in Abbott's presence and with his concurrance in the facts stated therein, discharging him for flagrant and willful disobedience of orders (R.501-502, 612-621).

The parties made defendants in Mr. Abbott's 1972 suit were the primary resource organizations available to Judge Thetford's court for placement of dependent children, with which he had to deal on a constant, but always, on their part, voluntary basis (R.497-98). After instigation of the suit, two of the defendants contacted Judge Thetford relative to their concern about it and that it would cause them financial difficulties. (R.548).

As in 1969, the problems advanced in Abbott's 1972 suit were at least partially already being remedied by Judge Thetford and Abbott was aware that Thetford was in the process of attempting to create new resources primarily for dependent black children (R.413,523-526).

Further, it later became clear that Abbott had never seen or investigated any facts concerning two of the minors he was representing and had only limited knowledge of the third (R.377-378,380-381). As the trial court found, there was no evidence that he had any relationship with or obligation to these minors or that others were not available who could have acted on their behalf without involving the juvenile court in the proceeding (354 F.Supp at 1287-88).

THE MOTIVATION OF THE ORDER AND DISCHARGE

In response to this portion of the petition, it must first be asserted, and in no less caustic terms, that petitioner's allegation that "Abbott's action interfered with Thetford's efforts to get funding for a racially segregated home for black children", is a bald-face lie. There was, nor can there ever be any evidence whatsoever that the group homes sought to be established, and later established by Judge Thetford, were ever intended to be, nor in fact are they, racially segregated. The writer is particularly and personally is offended at such characterization, since he has served on the Board of Directors of these homes since their inception. Should there be any question of such an allegation, such not being supported by the record, but now, for the first time alleged, Respondents request the opportunity of presenting evidence to the Court regarding this matter. Respondents allege that such characterization in the petition is a complete misrepresentation and totally unsupported by the record. The only inference of raciality in said homes was that the "need" was primarily for black placement and the group homes would serve this need as well as others.

Regarding the so-called "political motives" behind Judge Thetford's actions, it must first be noted that no such allegations, nor evidence, was introduced at the trial of this cause. Rather, upon conclusion of the trial counsel for all parties met with the Trial Judge in chambers to discuss procedures for post-trial memoranda. As part of the usual post-trial banter the Trial Court made some statement regarding the fact that Judge Thetford was an elected official, responsible to the voters for the actions of his appointees, and that obviously Mr. Abbott's actions might cause Judge Thetford concern for his re-election. No evidence of any such concern had been presented on trial. Six days later Abbott filed a Motion to Complete the Record alleging, in the form of a transcription though none was made, that the Trial Court had stated that Judge Thetford's actions were based upon the fact that the lawsuits filed by Mr. Abbott were unpopular with the electorate. (R.239-240). Further, Petitioner also attached to his post-trial memorandum a newspaper article from 1968, which had never been mentioned nor offered on the trial of the case.

Respondent filed a Motion to Strike the newspaper article and a Motion in Opposition to Petitioner's Motion to Complete the Record.

On February 1, 1973, the Court held an in chambers hearing on the various motions. Upon this hearing Respondent further moved to strike the newspaper article attached to Petitioner's memorandum as hearsay (R.658). Respondent's Motion to Strike the newspaper article was granted (R.660,246-247) and Petitioner's Motion to Supplement the Record was denied (R.246-248). The trial court's opinion concerning this matter was clear:

> "It is the duty of this Court to consider only what was pleaded and proved during the trial and not to consider its own suppositions, beliefs or information - other than those derived from the pleadings and evidence in the case. The parties

> voluntarily submitted this case on, and are entitled to a fair consideration of, the pleadings and the evidence in the case. This Court erred in suggesting, even in the privacy of chambers and after both sides had rested, an issue not theretofore considered. That error would be compounded into prejudice if the evidence were reopened for consideration of the court-injected issue." (R.247).

Petitioner now contends error on the basis of casual speculation about an issue not raised on the trial of the case and based only upon his own attorney's allegations of the conversation. As the Court properly found such would have been prejudicial error to the Respondent of the highest degree. The Trial Court considered only the issues and evidence properly presented upon the trial of the case and only such matters are reviewable on appeal.

Petitioner never objected to nor does he now complain that the Trial Court's ruling denying his motion was in error. Rather, on appeal he attempts to argue evidence not presented on the trial as if it were admitted. Such cannot be allowed as it would clearly deny Respondent due process of law.

In face of the Trial Court's granting of Respondent's Motion to Strike the newspaper article attached to Petitioner's memorandum, and without even mentioning such ruling, Petitioner attached the said article to his Brief on Appeal, and now alleges the totally inadmissable statements therein as "facts" in his petition.

It is clear throughout the record that the actual reason for Mr. Abbott's discharge was not the nature or content of his 1972 suit, Rather, Judge Thetford consistently related, in both his oral testimony and his written letter of discharge, that the true reason for discharge was Mr. Abbott's "flagrant and willful disobedience of orders". In light of the circumstances of the case, as

previously set out herein, discharge on such basis alone was permissible and consistent with the decisions of this Court and of the Circuits. See, Beilan vs. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958); Nelson vs. Los Angeles Co., 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960); NLRB vs. R.C. Can Co., 340 F. 2d 433 (5th Cir. 1965); NLRB vs. Soft Water Laundry, Inc., 346 F.2d 930 (5th Cir. 1965); Lefcourt vs. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971).

THE INTERESTS PROTECTED

At both the trial and appellate levels the key question regarding the protected interests in Abbott's suit was whether under prior decisions, such as Pickering and Pred, Abbott's individual rights overbalanced those of his employer. In this respect it was noted that Abbott was not the sole vehicle for the vindication of the rights sought to be established. The issue is not Abbott's personal rights but his rights on behalf of others. The basic constitutional right sought to be asserted by Mr. Abbott was that of free access to the courts, however he did not seek such access for vindication of personal complaints, but on behalf of others in a representative capacity. While this fact does not particularly effect the question of constitutionality, it is particularly significant in light of the balancing of private constitutional right against the public right to efficiency. Obviously, in balancing the employee's rights against those of the employer, the effect of the deprival of the right to the employee is of major import. In this case there is no evidence that deprival of Mr. Abbott's right to sue on behalf of others was a significant detriment to him or to those on whose behalf he sued. The District Court summarized the evidence in this regard stating:

> " Plaintiff argues with commendable zeal, that the rights of black minors to have their civil rights vindicated and the right of the Plaintiff to bring a suit to vindicate such rights outweigh 'state interest' allegedly

involved. While the civil rights of all are of grave importance to this Court, no clear legitimate reason appears why the minors would have been deprived of their rights had the suit been brought by some person other than a chief probation officer of a court needing the good will of the defendants".

" The suit is financed by the ACLU, whose members presumably are available for nominal as well as financial support. The files and records of this Court are regularly interspersed with suits brought by members of civil rights organizations, as well as their members, have courageously allowed their names to be used in such litigations. The only substantial evidence offered by Plaintiff as to scarcity of persons to act as next friend for the minors was that Plaintiff went to Attorney Mandell, presumably with expectations of suing as next friend for the then delinquent minor Player, and that he agreed to act as next friend for Coefield and Scott when Father James declined to act. Suffice it to say, there was no evidence of any substantial attempt to find any next friend other than Plaintiff Abbott, for the minors, and both Abbott's evidence and brief of the Plaintiff admit existence of a living father of one minor and a grandmother of another.

This evidence is relevant to show that the interest to be weighed against state interest in this case is the right of Abbott to file a suit for others, not the rights of minors to be vindicated. There was no substantial proof that the minors would have lost their rights had someone other than Abbott served as their next friend." (R.675-676).

In this same regard it is also significant to note the relationship between Mr. Abbott and those on whose behalf he sued. Abbott filed suit on behalf of three minor blacks - Emmett Player, Price Coefield and Charles Scott. Of the three he only had personal knowledge of Emmett Player, a ward of the Jefferson County (Birmingham) Juvenile Court, who while in placement at the Elks Memorial Center in Montgomery came to Mr. Abbott's attention on a gun charge. Mr. Abbott made no investigation of any facts concerning Coefield or Scott (R.377-78), nor did he make any effort to find suitable placement for them (R.380-81). His sole contact with Coefield and Scott was the fact that the man originally concerned about the, Father William James, was unwilling because of his position to file suit on their behalf. Father James testified:

> "Q. . . you did not want to file the suit as next friend because of your position. Can you explain that?
>
> A. I think so. I am a Catholic Priest, as you can see and as I have testified. Through my work at Fatima I knew that other private homes in the State of Alabama with the exception of Saint Mary's home in Mobile and Boys Ranch in Selma and are run by other religious denominations. If I had personally filed this suit I thought that it would look like the Catholic Church versus some other church,and I did not think this would be good." (R.307).

Father James weighed his position as director of a Catholic boys home (Fatima) which was closing due to lack of finances and the position of his church and determined, as a "reasonable man", that the possible detrimental impact of his filing suit

would outweigh his right as opposed to another to act on behalf of the boys. The weights placed on the scale by Father James were nominal compared to those of Mr. Abbott.

THE RELATIONSHIP BETWEEN JUDGE AND CHIEF PROBATION OFFICER

The findings of the trial court concerning the relationship between the judge and his chief probation officer are clear. They were supported and reiterated by the Fifth Circuit. They are well supported in the evidence and are not clearly erroneous.

The evidence was in fact clear that the position of Chief Probation Officer is one which requires the utmost in trust and cooperation with the presiding judge. The Family Court Judge in addition to hearing all divorce, custody, and related cases, must supervise a large Juvenile Court staff; in order to do so he must depend heavily on the Chief Probation Officer, as his immediate communications link. On trial of this cause two other Juvenile Judges, from Jefferson and Mobile counties, testified that the Chief Probation Officer is their key employee and "the highest degree of cooperation from and confidence in him is absolutely essential to the operations of their courts". (R.444-445, 632).

Abbott was far more than a secretary or law clerk and the mere fact that he and the judge may have "seen" each other only once a week has no bearing on their contact with each other. The telephone was long ago invented; and was greatly used by Judge Thetford.

THE LAWSUIT MATERIALLY AND SUBSTANTIALLY INTERFERED WITH THE OPERATIONS OF THE COURT

The question of the disruption and interference with the operations of Thetford's court was key on appeal and was considered by the full Fifth Circuit, all but two of those judges agreeing the disruption was significant.

In this case Mr. Abbott's conduct was directed toward agencies with which he and the Juvenile Court, through him and those under him, had direct consistent contact. Mr. Abbott filed suit against the Department of Pensions and Security (D.P.S.) and six private children's homes. D.P.S. has primary responsibility for placing dependent and neglected children in Alabama, and in so doing works closely with the various county probation staffs. The close relationship between a local Juvenile Court and D.P.S. was characterized by James Strickland, Juvenile Judge for Mobile County, in these words: ". . . without the Department of Pensions and Security we might as well close the Court". (R.445, 469). Certainly common sense would dictate that a suit against the agency and the publicity attendant to it could do nothing but harm the relationship between Mr. Abbott and D.P.S., Abbott vs. Thetford, ___F.2d 2683 at 2694 (Gewin, dissenting).

As Chief Probation Officer, Mr. Abbott was charged with the duty of dealing with D.P.S. on a near daily basis, and he was the direct link in the routine contacts between D.P.S. and Judge Thetford. Mr. Abbott alleged in his suit that he was Chief Probation Officer and that such was the source of his concern about the alleged failures of D.P.S. Judge Strickland testified that in his experience as a Juvenile Judge such actions would "certainly" be detrimental to his (the Judge's relationship with that department (R.445).

While D.P.S. did not actually take any known action directly against Judge Thetford's court, especially in the light of Mr. Abbott's immediate discharge, Respondents contend that under the circumstances and evidence it could certainly have been reasonably forecast that Mr. Abbott's actions would have a material and substantial effect on his dealings with D.P.S., and that detrimental relations between the Court's Chief Probation Officer and D.P.S. would materially and substantially effect the operations of the court itself. This detriment is even more evident when it is considered that the Chief Probation Officer would be expected to deal more closely with the "executive" employees of D.P.S. who would be closer to the responsibility for the failures he alleged and with the Commissioner of D.P.S. who was sued in his individual, as well as his official, capacity. The expectation of detriment under these circumstances goes far beyond the category "undifferentiated fear or apprehension" and the effect of Mr. Abbott's actions against D.P.S., under the best of circumstances, materially and substantially impaired his usefulness as a Chief Probation Officer. Battle vs. Mulholland, 439 F. 2d 321 (5th Cir. 1971).

In addition to D.P.S., Mr. Abbott sued six private children's homes, many of which were resources of the court in varying degrees and all of which accepted referrals from Judge Thetford on a purely voluntary basis. (R.497-98, 546). One of the homes sued (Brantwood) was the primary resource of its type for Judge Thetford's court. However, there was no duty or requirement on Brantwood to so serve Judge Thetford's court. To the contrary, Brantwood is entirely independant and could have sought referrals at any time from other Juvenile Courts which were actively seeking such placements. As was alleged by Mr. Abbott in his 1972 suit there was a strong need for such placement opportunities at the time.

As with D.P.S. the position of Mr. Abbott as Chief Probation Officer required a direct and constant communication and cooperation with these homes, especially Brantwood. His actions were directly inconsistent with the necessities of his duties and with "reasonableness" could only be viewed as potentially and substantially disruptive of his contact with these homes. And, again, disruption of contact between the Chief Probation Officer and a resource could be reasonably foreseen to substantially disrupt the workings and chain of command of the court. The reasonableness of this forecast was evidenced by the fact that personnel from two of the homes (Brantwood and Presbyterian) called Judge Thetford personally to express concern that Mr. Abbott's suit would hurt them financially. (R. 548, 65). Certainly these calls would not have been to Judge Thetford had it not been for the fact that it was one of his staff that filed the suit. These calls were made after Judge Thetford's prompt discharge of Mr. Abbott, so conjecture as to what the callers might have said or done had Abbott not been discharged would be mere speculation. However, it is not speculation, but to the contrary, it is only reasonable to forecast that there would have been a serious detriment in relations with these homes.

As Chief Probation Officer Mr. Abbott was the intermediate link in the chain of command from the Judge to his probation staff of approximately forty employees. Judge Strickland testified that it is "absolutely essential" that the judge have the highest possible degree of cooperation between him and his chief probation officer. (R.445). Judge James D. Buck, Juvenile Judge of Tuscaloosa County, testified that for the proper operation of the court the judge must have "complete and absolute confidence" in his chief probation officer and characterized him as "the right arm of the judge". (R.632). Mr. Abbott's conduct, weighed with the circumstances surrounding and preceeding

his actions in 1972, totally destroyed all semblance of cooperation or confidence between he and the judge.

The destruction of the necessary close relationship between the judge and Mr. Abbott and Mr. Abbott's flaunting disregard of the judge's directive could have had no other result but to harm the overall operations of the court, specifically, the chain of command from Judge to Chief Probation Officer to Staff. It would be absurd to assume that under the prior circumstances and dissemination through the ranks of the judge's directive, that every staff member could not foresee the impact of Abbott's actions. In this context Judge Thetford was placed in the position of having to take affirmative action or facing similar discipline problems down the ranks, or at best being accused of favoritism in later causes for discipline, which would create disharmony among his staff.

Further, Mr. Abbott's attitude and actions were destructive to his overall ability to function in his capacity of liason between the judge and his staff. This destruction is illustrated by the evidence concerning the way in which Judge Thetford's directive was passed down to staff members. Mrs. Goodwyn and Mr. Franklin, the other key personnel at the meeting, informed their direct subordinates that no suits should be filed which affected the court without Judge Thetford's prior knowledge (R,582-84). Mr. Abbott stated at his staff meeting that he felt it "only fair" or "his duty" to inform the staff that they were not to "file, aid or assist in filing suit in any way a suit in any court." (R.272). The discrepancy between these conveyances of the policy of the court can illustrate nothing but the fact that Mr. Abbott's personal concerns and feelings against Judge Thetford were distorting his ability to

communicate between the judge and the staff. Such a breakdown in communication, one of the most vital aspects of Abbott's job, is fatal to the overall functioning of the court and to the harmony of the staff with and between their superiors.

Mr. Abbott's attitude was obviously one of total disdain for his judge, and this attitude was conveyed to the rest of the staff. Upon leaving Judge Thetford's office after the issuance of his directive against the filing of suits affecting the court, Mr. Abbott turned to Mr. Franklin and stated "Somebody has been talking to the Judge." (R.570). Again on the occasion of the filing of the suit, Mr. Abbott reflected to Mrs. Schremser (a staff employee):

> "He said, 'Well, I have done it again.' I say, 'Done what?' He said, 'I have filed another suit.' I asked him, 'Have you lost your cotton-picking mind?' He said, 'No, I like to keep things stirred up.'". (R.602).

These conversations, especially in the light of Mr. Abbott's testimony that he did not even "consider" discussing the matters of the suit with Judge Thetford (R.382), certainly indicate a "calculated" disregard for the orderly operations of the court and of the necessary confidence and trust between Judge and Chief Probation Officer. They further emphasize Abbott's disregard in respect to the harmony of employees, his remarks being "calculated" to do no more than accentuate the discord between himself and the judge.

THE MOTIONS FOR RECUSAL

Shortly after the instant case had been assigned to him, the Trial Judge met with counsel in chambers to discuss setting a hearing date for

Plaintiff's Motion for Preliminary Injunction. To the best recollection of the writer, during this discussion the Judge informed counsel, in substance, that since he had practiced law in Montgomery for many years he was, of course, a friend of the Defendant, Judge Thetford. He stated that he also knew the Plaintiff, Denny Abbott, and considered him a friend, though his friendship was not as developed as that with the Defendant. The Judge told counsel for Plaintiff that he felt he could be fair and impartial in this case but that he would understand if counsel for Plaintiff wished to file a Motion for Recusal. Counsel for Petitioner, Mr. Mandell, replied, in substance, that he would feel awkward asking any judge to recuse himself and did not feel that he should so ask in this instance. Obviously, realizing counsel had a duty to his client in this regard, the Judge said that if upon discussing the matter with his client, counsel decided to file such a motion it would be understood and received without prejudice to counsel or Plaintiff.

On December 13, 1972, counsel for Plaintiff filed a Motion to Recuse setting out, in substance, the Court's discussion and stating that upon conferring with his client he had decided to so move (R.21).

On December 15, 1972, Plaintiff's counsel filed an Amendment to the Motion to Recuse (R.23-25) quoting a "dialogue" which allegedly transpired between the Judge and counsel for Plaintiff. A footnote to the alleged transcription stated that it "should not be construed as a verbatim recitation". (R.23). Respondents will not speculate upon the motives for amending his motion to set out an alleged transcription of what had previously been fully and properly set out in substance, but notes that at this stage of the proceedings the alleged conversations are treated as established facts and argued as such with no notation of their source.

Obviously, the trial judge had the best recollection of what he said and acted in accordance therewith. It is absolutely clear from the recorded record in this case that the Trial Judge felt that his friendship with the Defendant would not effect his fairness or impartiality and it was for this reason that he exercised his discretion as he did. Concerning Plaintiff's counsel's rendition of the judge's remarks regarding fairness, the Trial Judge stated:

> "Now, I further recall that it was my statement, not that I can't be sure, but that I can not say that I can't be fair and impartial in this case." (R.168).

Shortly, thereafter, the Court reinterated its feelings, stating:

> ". . . I don't have any feeling that I might be unfair about this case. I think I can be perfectly fair about it." (R.169).

From the record it is apparent that the Trial Judge had no question in his mind but that he could and would rule fairly and impartially in this case.

Perhaps the reason the Fifth Circuit did not write to the issue of recusal was the lack of any appealable record in regard to it. In any respect a question to that Court could easily clarify the matter.

REASONS FOR GRANTING THE WRIT

I. A. Infringement of First Amendment Rights Based on Impermissible Reasons

Petitioner's allegations that Judge Thetford

was seeking to expand segregation by seeking funding for a "black home" are, as previously noted, totally false and unsupported by the evidence. The group home sought to be established by Judge Thetford, along with the Junior League and Council of Jewish Women and other organizations, was created with a bi-racial board of directors to establish group homes for all creeds and races. These homes were established on this basis and have operated as such. The only mention of race in the record is with regard to the fact, as alleged by Petitioner, that placement facilities were needed more for blacks than whites, and that, being non-racial, the group homes would provide space for blacks (as well as whites).

Nor was there evidence in the trial that Judge Thetford "did not favor the efforts to end segregation". To the contrary, at all levels of these proceedings Respondents have admitted the basic beneficial purposes of Petitioner's suit. The issue has always been and is still now, not the ends sought but the means asserted to obtain them, and the effect of those means on Mr. Abbott's position.

Likewise, neither did the evidence support, nor did the Fifth Circuit decide, that the "justification" of the "State" action in discharging Abbott was merely the fact that others could have as easily sought the ends on behalf of those Abbott represented. Clearly, the Fifth Circuit's opinion and that of the trial court was based upon the totality of the circumstances. The fact that Abbott had no real personal knowledge of two of three juveniles he sought to represent and only slight knowledge, and no official responsibility for, the third, was merely <u>one</u> of the factors considered.

B. <u>MOTIVATION OF THE ORDER IS RELEVANT</u>

Again, Petitioner's argument in this respect is based upon a misrepresentation, or misinterpretation, of the facts in the record. No where is there evidence that Judge Thetford was motivated by a desire to stop lawsuits "concerned with racial discrimination". The facts as presented and as found below, were that Judge Thetford's concern was that his resources were sued and the effect it would have on his court. He did not agree with the "means" in the context of his court being involved. The text of the testimony in this regard is as follows:

> "Q. Are you or are you not in agreement with the relief sought in this lawsuit entitled "Player vs. the Department of Pensions & Securities, Et Al,"?
>
> A. Relief sought -
>
> Q. Are you in agreement with or do you believe that these private homes should be integrated?
>
> A. Only if they want to be integrated. I don't think they should be forceably integrated.
>
> Q. I take it that you do not agree with the relief then sought by Mr. Abbott in this lawsuit if he is seeking to have these homes integrated?
>
> A. I do not believe - first, let me say this, I do not believe in filing lawsuits against your resources and they are certainly resources to the court.

Q. Then was not - do you or do you not agree - believe that these institutions should be integrated?

A. Only if they want to be, I think two of them or maybe more have filed Certificates of Compliance which under the proper circumstances they will integrate. Some of them have refused to sign. I think it should be on a voluntary basis.

Q. But if they don't want to integrate they shouldn't be forced to by a Federal lawsuit?

A. That is right."

(Exhibit A p. 85-86)

The testimony was clear that Judge Thetford's personal opinion of the proper way to achieve an end was not the reason for Mr. Abbott's discharge. To the contrary, the reason was Mr. Abbott's direct violation of an order in consideration of all of the circumstances surrounding Mr. Abbott's past conduct.

"Q. Has not Mr. Abbott been an exceedingly competent, and good Chief Probation Officer for the past - well, since you have been juvenile court judge?

A. The past three years, no.

Q. Why do you say no?

A. We have no communication at all. I have no earthly idea what he is doing, he hasn't made me aware of what he is doing.

Q. Do you know he -

A. At one time, while I took no disciplinary action, I found that he had gone to Atlanta for two or three days without my knowledge and then tried to claim county expense. It was completely unauthorized. There have been other things.

Q. But the reason you discharged him was violating your oral instruction, is that correct?

A. That is correct, I put it on nothing other than that."

(Exhibit A p. 87)

Mr. Abbott further argued that the "real" reason behind his discharge was Judge Thetford's fear of political reprisal. As to this matter it must be emphasized that the first entry of this element into the case came <u>after</u> the trial and was introduced - according to the Appellant's attorney's reconstruction - by the trial judge. Judge Varner later admitted his error in even mentioning matters not raised in the trial and clearly stated that he should not and would not consider such, stating:

"It is the duty of this Court to consider only what was pleaded and proved during the trial and not to consider its own suppositions, beliefs or information - other than those derived from the pleadings and evidence in the case . . . This Court erred in suggesting, even in the privacy of chambers and after both sides had rested, an issue not theretofore considered. That error

would be compounded into prejudice if the evidence were reopened for consideration of the court-injected issue." (R.247).

On appeal to the Fifth Circuit, Petitioner did not contend that the lower court erred in refusing to allow the introduction of this issue, but, ignoring the trial court's opinion, sought to introduce this issue anew on appeal when the Respondents have no opportunity to present evidentiary rebuttal. Such is not the judicial process of this country.

Further, should this issue be injected on appeal, it can do nothing but assist Judge Thetford. If in fact, as Abbott alleges, the public ire would be so capable of being raised by Mr. Abbott's actions in his position with the Court so as to cause Judge Thetford's political defeat, then it can not be said but that the Court would have suffered extreme detriment had not Abbott been discharged. The "Family Court" is truly the court of the people. It is the court in which, in addition to all juvenile matters, all domestic matters are tried. It sees more people, affects the lives of more people, and is more dependent upon the help and cooperation of the public than any other court in the State. And if the people would react so affirmatively to these actions as to defeat a judge never before even contested, then the all important image of the court has been severely damaged.

II. Comity and Federalism

Respondents must agree that the adoption by the Fifth Circuit En Banc of a dissenting opinion below causes the judgment to read in different form than is usually expected and in some ways creates some confusion. However, it

is clear from a careful reading of the dissent (later majority) opinion that the grounds of the decision were neither federalism or comity or judicial immunity. The Fifth Circuit considered the matter properly upon the basis of and criteria announced by the many past employment decisions and based its decision on the "time, place and circumstance"of this case.

Petitioner places emphasis on the fact Abbott was a merit system employee. In this respect it must be noted that Abbott never once attempted to pursue any merit system remedies, either before or after his discharge.

III. Standards For Recusal
28 U.S.C. §455

Title 28, §455, of the United States Code was amended effective in December 1974. This case was argued before the Fifth Circuit in November of 1973 and was fully submitted to the court well prior to the effective date of the amendment.

Further, even if, as asserted by Petitioner, the amendment is applicable to this appeal, it would be effective only as to recusal issues directed toward the judges of the Fifth Circuit, not the District Judge, who tried the case two years prior to the amendment.

The Fifth Circuit did not specifically comment on the issue of recusal. However, such issue was raised upon appeal and it must therefor be presumed that the issue was determined in favor of the Respondents. Further, this presumption of the ultimate decision carries with the presumption that the Fifth Circuit considered the matter in the light of the then applicable law. With no other findings to the contrary this issue presents nothing for review.

Petitioner also raises the question of the proper test of "reasonableness" under the amended statute. Again, there is no such issue presented by this cause. The concept of the "reasonable man", as opposed to the "reasonable litigant", is as ingrained in our legal system as trial by jury and Petitioner's argument requires no real response, except to note that if appeal is desired from the opinion rendered in Parrish, it should be made in that case.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Certiorari be denied. This cause has been fully and carefully deliberated by the Fifth Circuit En Banc with only two dissenting votes and should finally be laid to rest.

Respectfully submitted,

Richard H. Dorrough
Attorney for Respondents
P. O. Box 429
Montgomery, Alabama 36101